

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILFRED HART, JR.,)	
)	
Petitioner)	
)	
v.)	Civil No. 91-0088 B
)	
UNITED STATES OF AMERICA,)	
)	
Respondent)	

**PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION
ON MOTIONS TO VACATE PETITIONER'S
SENTENCE AND CONVICTION**

Wilfred Hart, Jr., serving a total of thirty years for conspiring to possess and distribute cocaine in violation of 21 U.S.C. ' ' 841(a)(1), 846 and 18 U.S.C. ' 2, petitions this court, pursuant to 28 U.S.C. ' 2255, to overturn his conviction and vacate his sentences.¹ His conviction and sentences were upheld on appeal.² See *United States v. Hart*, 933 F.2d 80 (1st Cir. 1991).

Hart asserts six grounds for relief: (1) ineffective assistance of trial counsel; (2) prosecutorial abuse of discretion in fractionalizing one conspiracy charge into two; (3) prosecutorial misconduct in knowingly relying upon perjured testimony at trial; (4) failure of the trial judge to recuse himself for

¹ Hart was sentenced to consecutive terms of fifteen years on counts 1 and 12 and to concurrent terms of fifteen years on each of counts 2 through 6, 8 through 11 and 13 through 14. Count 7 was dismissed on the government's motion.

² In April 1991 Magistrate Judge Keith recommended that the petitioner's original and amended motions be denied without prejudice based on the fact that his appeal of the judgment and conviction was still pending. To date, the court has not acted on those recommendations. In this recommended decision I address all of the claims raised by Hart in his first two motions as well as a sixth claim raised in his supplemental motion dated May 10, 1991 and restatements of his first and fifth claims made in his supplemental motion dated November 5, 1991.

bias; (5) ineffective assistance of appellate counsel; and (6) violation of his right to a speedy trial under the Speedy Trial Act ("Act") and the Sixth Amendment.

A section 2255 motion is subject to summary dismissal if, "together with all the files, records, transcripts, and correspondence relating to the judgment under attack . . . it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief" Rule 4 of the Rules Governing Section 2255 Proceedings in the United States District Courts. This initial hurdle serves a gatekeeping function, alleviating the burden of litigating plainly unmeritorious claims.

For the reasons enumerated below, I recommend that the court summarily dismiss Hart's post-conviction motions.

I. BACKGROUND

On January 15, 1986 a federal grand jury returned a secret indictment against Hart. After he was arrested in Texas on state drug charges on April 30, 1986 and while released on bail pending trial, Hart agreed to removal to Maine where he appeared before Magistrate Judge Keith on July 11, 1986. On that same day the government moved for detention pending trial. A detention hearing was held on July 15, 1986 and two days later the court ordered Hart detained. He was ordered released on bail on October 27, 1986 but his bail was revoked on December 16, 1986, following his December 4, 1986 arraignment on a superseding indictment. Second and third superseding indictments were filed on January 29 and March 23, 1987.

After Hart filed a number of pro se motions and several of his attorneys withdrew,³ the court held a hearing on December 23, 1987 to address his request to represent himself. On that same date the court ordered that a mental competency hearing be held following psychological evaluation of Hart. The next day an order was entered tolling the Speedy Trial Act clock from December 23, 1987 to the time of the competency hearing. The psychological evaluations could not be completed because of Hart's intransigence, and on March 23, 1988 the court mooted the competency issue. Subsequently, the judge ordered excluded from the time running under the Act the period March 31, 1988 to May 23, 1988, the day on which Hart's trial commenced.

Between July 11, 1986 and December 23, 1987 Hart filed more than seventy-three separate motions, many of them pro se, at the rate of no less than one every thirty days. *See* Docket No. 86-00041-B *passim*.

Despite his request to represent himself, Hart was represented at trial by court-appointed counsel. On appeal Hart presented pro se the issue asserting that his conviction and sentences constituted double jeopardy. All other issues were presented by his eleventh attorney.

II. PROCEDURAL BAR

A. Foreclosure

“It is settled that a 2255 motion may not revive issues previously determined on direct appeal.” *United States v. Butt*, 731 F.2d 75, 76 n.1 (1st Cir. 1984) (citation omitted). “[C]ollateral reconsideration is permitted only where there has been an intervening change in the law and the new

³ Hart was represented by nine different attorneys between July 17, 1986 and the end of his trial and by two other attorneys during his appeal.

law would have exonerated [the] defendant had it been in force before the conviction was affirmed on direct appeal." *Johnston v. United States*, 832 F.2d 1, 1 n.1 (1st Cir. 1987) (citation omitted).

Hart's claim of ineffective assistance of trial counsel was raised before the First Circuit on direct appeal. He does not argue that the applicable law has changed and that he would have been exonerated had it been in effect at the time of his conviction. While it is not clear whether Hart is suggesting deficiencies of trial counsel not enumerated on direct appeal, the ruling of the First Circuit has unambiguously foreclosed further consideration of this claim. After agreeing to consider Hart's ineffective assistance claim, notwithstanding the fact that it had not yet been presented to this court, the appeals court stated: "We conclude, without difficulty, that Hart's many attorneys -- in particular, the two who represented him at trial -- have represented him with both competence and patience. Hart's sixth amendment claims can be dismissed in perpetuity." *Hart*, 933 F.2d at 83.

B. Default

The Supreme Court has long held that "a collateral challenge may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). Therefore a petition for post-conviction relief will be dismissed unless it alleges constitutional violations that were not cognizable at the time of direct appeal. See *Murchu v. United States*, 926 F.2d 50, 53-54 n.4 (1st Cir.), *cert. denied*, 60 U.S.L.W. 3259 (U.S. Oct. 7, 1991). However, a petitioner may overcome failure to raise a claim on appeal by satisfying the "cause and actual prejudice" standard first enunciated in *Davis v. United States*, 411 U.S. 233 (1973), and extended to appellate defaults by *Smith v. Murray*, 477 U.S. 527, 533 (1986) ("[A] federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial.") Under this standard, to obtain collateral

relief a convicted defendant must show both (1) "cause" excusing his default, and (2) "actual prejudice" resulting therefrom.

With the exception of his claims of ineffective assistance of counsel,⁴ Hart should have asserted his present post-conviction claims on appeal. However, he did not do so and therefore he raises them for the first time collaterally. Hart alleges prosecutorial knowledge and reliance on perjured testimony, prosecutorial abuse in charging two conspiracies instead of one and failure of the judge to recuse himself. Supplemental Section 2255 Motion (May 10, 1991) at 1-5; Defendant's Amended 2255 Motion to Vacate Judgment (April 16, 1991) at 4-7. The petitioner makes no assertion that newly-discovered evidence led to his claims. Instead, he makes no showing of cause whatsoever. Nor is any cause for failure to raise these claims evident in the record. All three allegations flow from facts that Hart could have discerned at the time of his direct appeal. On this basis alone the court is foreclosed from considering these allegations.⁵ Hart's contention that he had cause for failing to raise his speedy trial claim is addressed below in concert with his claim of ineffective assistance of appellate counsel.

III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The effectiveness of appellate criminal-defense counsel is evaluated according to the same standards applicable to trial counsel. *Smith v. Murray*, 477 U.S. at 535 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To be constitutionally ineffective, a defense attorney's performance must not only be deficient but also so prejudicial as to undermine confidence in the

⁴ Ineffective-assistance-of-counsel allegations are properly addressed to the trial court in the first instance. *Hart*, 933 F.2d at 82.

⁵ In a motion dated October 7, 1991 Hart moved the court to adopt the facts described therein relating to his claim of prosecutorial abuse in charging. The claim is procedurally barred and therefore his motion is moot.

justness of the trial's result. *Strickland*, 466 U.S. at 687. However, ``there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697.

The petitioner alleges that appellate counsel was ineffective primarily for failing to raise certain claims on appeal. Petitioner's Memorandum Motion for Awarding Habeas Corpus Forthwith for Respondent is in Contempt of the Court's Disclosure Order (July 27, 1991) at 2-3. In particular he asserts counsel's failure to argue that his conviction on two different conspiracy counts fractionalized a single conspiracy yielding multiple punishments constituting double jeopardy and that the pretrial delay of nearly twenty-two months violated his right to a speedy trial. *Id.* Hart further asserts that counsel's ineffectiveness was cause for his failure to raise the speedy trial claim on direct appeal. *Id.* I conclude that Hart's claims are meritless because he was not prejudiced by either alleged failing of counsel.

A. Double Jeopardy

Counsel did not raise Hart's double jeopardy claim on appeal. However, this alone does not indicate ineffectiveness. Hart raised the issue himself by pro se motion and the First Circuit thoroughly considered it. Following a full discussion the court stated, ``We conclude that Hart was not subjected to double jeopardy by his consecutive sentences arising from his simultaneous conviction on the two separate and distinct conspiracy counts." *Hart*, 933 F.2d at 86. Based on the court's thoughtful treatment of Hart's claim, I find that no prejudice resulted from counsel's failure to raise this issue on appeal.

B. The Speedy Trial Act

The Speedy Trial Act, 18 U.S.C. ' ' 3161-3174, assures an accused a timely disposition of criminal charges against him. The statute requires that,

[i]n any case in which a plea of not guilty is entered, the trial of a defendant . . . shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. ' 3161(c)(1). Although the plain words of the statute appear to require strict adherence to the seventy-day clock, Congress has recognized the unavoidability of certain periods of delay and has provided for their exclusion from the computation of the seventy days. One such sanctioned period of delay is that ``resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. ' 3161(h)(1)(F). Once a motion is actually taken under advisement by the court the clock remains stopped for a period not to exceed thirty days. *Henderson v. United States*, 476 U.S. 321, 328-29, 331 (1986) (interpreting 18 U.S.C. ' 3161(h)(1)(F) and (J)). However, a motion is not deemed to be under advisement until ``the court receives all the papers it reasonably expects" for the disposition of the motion. *Id.* at 328-29. Similarly, the statute exempts any ``delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant." 18 U.S.C. ' 3161(h)(1)(A). Also excluded is any period of delay from a continuance granted by the judge ``on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. ' 3161(h)(8)(A).

On its face the nearly twenty-two month period from Hart's first appearance on July 11, 1986 to the commencement of his trial on May 23, 1988 appears suspect.⁶ On closer examination, however, it is indisputable that the petitioner's torrent of motions was the primary cause of the pretrial delay. Between July 11, 1986 and December 23, 1987 the petitioner filed more than seventy-three separate motions, sometimes one at a time and sometimes in batches of as many as thirteen, but at least one every thirty days. With each filing a new statutorily sanctioned delay period commenced. 18 U.S.C. ' 3161(h)(1)(F) and (J). Consistently, each of his new filings tolled the clock for a new thirty-day period before the court disposed of his earlier motions and before the thirty-day statutory period as to those motions concluded.

In addition to the effects of Hart's motions, on December 24, 1987 the trial judge ordered the clock stopped until a mental competency hearing could be held. That issue was mooted on March 23, 1988. This entire period is excludable under section 3161(h)(1)(A). Authorized by section 3161(h)(8)(A), the judge also ordered that the rest of the pretrial period, from March 31, 1988 to May 23, 1988, be excluded. I find that the intervening week between March 23 and March 31 was excluded due to pending motions filed by Hart.

The only period of time during which the speedy trial clock ran was from the day Hart was ordered detained, July 17, 1986, through the day before his motion practice began, July 23, 1986. Therefore, only six days of the nearly twenty-two months of pretrial delay were not attributable to

⁶ In Hart's case the seventy-day speedy trial clock ordinarily would have begun to run on July 11, 1986, the date of his initial appearance. However, the intervening motion for detention, detention hearing and detention order delayed the initial running of the clock until July 17, 1991.

Hart's own conduct. This calculation reveals that Hart's right to a speedy trial under the Act was not violated.

C. The Sixth Amendment

The First Circuit has explained that

The Act is not intended to ` ` bar [] any claim of denial of speedy trial as required by amendment VI of the Constitution." 18 U.S.C. ' 3173 (1974). It would be, however, ` ` an unusual case in which the time limits of the Speedy Trial Act have been met but the sixth amendment right to speedy trial has been violated."

United States v. Mitchell, 723 F.2d 1040, 1049 (1st Cir. 1983) (quoting *United States v. Nance*, 666 F.2d 353, 360 (9th Cir.), *cert. denied*, 456 U.S. 918 (1982)).

As evidenced by the foregoing calculation of excluded time under the Act, Hart's own actions were the primary cause of the delay in his trial. His constitutional claim is both meritless and disingenuous, for his own prolific motion practice showed a substantial disregard, if not lack of desire, for proceeding to trial with haste.

Because neither Hart's statutory nor constitutional rights were violated, it would have availed him nothing had appellate counsel raised the speedy trial issue on direct appeal. Therefore, I find no prejudice resulting from counsel's failure to do so. Hart's claim that ineffective assistance of appellate counsel was cause for his failure to raise his speedy trial allegation on appeal is meritless. His claim is procedurally barred.

IV. CONCLUSION

For the foregoing reasons, I recommend that Hart's motions for relief be summarily

DISMISSED pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings.⁷

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 14th day of November, 1991.

David M. Cohen
United States Magistrate Judge

⁷ If my recommended disposition is accepted, Hart's other pending motions for bail, evidentiary hearing and discovery will be moot.